

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:19-CR-33 JCM (VCF)

Plaintiff(s),

ORDER

v.

DEMETRICK LEE TELLIS II,

Defendant(s).

Presently before the court is Magistrate Judge Ferenbach's ("Judge Ferenbach") report and recommendation ("R&R"). (ECF No. 50). The United States of America (the "government") filed an objection (ECF No. 51), to which defendant Demetrick Lee Tellis, II ("defendant") responded (ECF No. 52).

Also before the court is the government's motion for leave to file a reply. (ECF No. 53). Defendant opposed the motion. (ECF No. 55).

Lastly before the court is defendant's motion to suppress. (ECF No. 26). The government filed a response (ECF No. 32), to which defendant replied. (ECF No. 49).

I. Facts

Defendant is charged with being a felon in possession of ammunition. (ECF No. 12). Defendant now moves to suppress all evidence of the alleged crime seized during his arrest for resisting and obstructing officers, which began when he was allegedly observed walking in a roadway. (ECF No. 26).

The facts of the case, as summarized below, are taken from Judge Ferenbach's R&R. *See* (ECF No. 50). Judge Ferenbach discerned the facts from witness testimony (ECF No. 43) and exhibits (ECF Nos. 40, 41) introduced at a May 15, 2019, evidentiary hearing. Where

1 appropriate, the court will note the parties' objections to the facts as Judge Ferenbach stated
2 them.

3 On January 25, 2019 at approximately 11:00 pm, Officer Beckley was driving northeast
4 on Las Vegas Boulevard between Cheyenne and Walnut. (ECF No. 40 at 3, Government Exhibit
5 2; ECF No. 41 at 8–9, Defense Exhibit M; ECF No. 43 at 16). As she neared Walnut, she saw
6 defendant walking with a female southwest along Las Vegas Boulevard, towards Officer
7 Beckley, on the side of the road facing traffic. (ECF No. 43 at 16–19, 65). Defendant was
8 legally crossing Walnut at its intersection with Las Vegas Boulevard, where no sidewalk is
9 provided. (ECF No. 40 at 3, circled; ECF No. 43 at 19).

10 Officer Beckley knew defendant by sight. (ECF No. 43 at 70). Once Officer Beckley
11 saw defendant, before he had done anything wrong or even suspicious, she radioed her sergeant
12 that she “saw Tellis walking on the sidewalk, and ... [she] was going to try and make a stop on
13 him.” *Id.* at 69. At the evidentiary hearing, Officer Beckley testified that “[a]ll of us know who
14 Tellis is” because “we know he’s committed multiple crimes in our area command.” *Id.* at 70–
15 71. Officer Beckley also stated that any time she would see defendant, she “would conduct
16 surveillance on him” because she thought “[t]hat he could possibly be armed or going to commit
17 a crime.” *Id.* at 72–73.

18 Officer Beckley drove past defendant and performed two U-turns, looping around Las
19 Vegas Boulevard so that she was once again driving northeast towards defendant, who had
20 continued to walk southwest. *Id.* at 65–66. As Officer Beckley drove by the entrance to a
21 parking lot with a Jack in the Box, she saw defendant walk in the roadway. (ECF No. 40 at 2,
22 Government Exhibit 1; ECF No. 43 at 45, 66, 85). At the evidentiary hearing, Officer Beckley
23 testified that she saw defendant take “approximately five steps” in the Las Vegas Boulevard
24 roadway, “and then walked back onto the sidewalk,” “right after” walking across a driveway
25 entrance into an apartment complex. (ECF No. 40 at 2, circled; ECF No. 43 at 22–23).

1 Judge Ferenbach found that Officer Beckley's testimony was not "consistent or credible
 2 on this point."¹ (ECF No. 50 at 2). Judge Ferenbach noted that "Officer Beckley also testified
 3 that she saw Defendant step off the sidewalk in the driveway of the apartment complex, where
 4 no sidewalk was provided." *Id.* (citing ECF No. 43 at 45, 66). Judge Ferenbach further noted
 5 that "Officer Beckley never clarified how or whether [d]efendant's actions in crossing the
 6 apartment complex driveway were separate from his actions in stepping into the roadway.
 7 Officer Beckley was also inconsistent regarding whether she considered [d]efendant's offense to
 8 be jaywalking or being a pedestrian in the roadway." *Id.* (citing ECF No. 43 at 24–25, 52–53).

9 Moreover, the R&R provides that "[w]hile Officer Beckley testified that the female
 10 walking with defendant did not step off the sidewalk at the same place as defendant (ECF No. 43
 11 at 26–27), Officer Beckley never mentioned seeing the female cross the apartment complex
 12 driveway, which the female must have done to remain walking with [d]efendant." (ECF No. 50
 13 at 2–3). Finally, Judge Ferenbach points out that "Officer Beckley's arrest report fails to include
 14 several details of the incident, such as the female walking with [d]efendant and where
 15 [d]efendant allegedly stepped off the sidewalk. *Id.* at 3. "The arrest report does not mention that
 16 Officer Beckley knew [d]efendant by sight." *Id.*

17 After observing defendant allegedly step onto Las Vegas Boulevard, Officer Beckley did
 18 another set of U-turns to return to the Jack in the Box parking lot. (ECF No. 43 at 67). Officer
 19 Beckley attempted to conduct a stop on defendant, but defendant ran inside a gas station. (ECF
 20 No. 41 at 8–9, Defense Exhibit M). After a struggle with officers, defendant was taken into
 21 custody. *Id.* Defendant was initially booked for resisting and obstructing officers. *Id.* Officer
 22 Beckley searched defendant incident to arrest and found ammunition in his backpack. *Id.* On
 23 January 29, 2019, defendant was arrested by the Federal Bureau of Investigation for unlawful
 24 possession of ammunition. (ECF No. 26 at 4).

25 Following the May 15, 2019, evidentiary hearing, the parties submitted closing briefs.
 26 (ECF Nos. 45, 48, 49). After considering the evidence and testimony presented at the

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 28 ¹ The government objects to Judge Ferenbach's finding that Officer Beckley's testimony
 was not consistent or credible. (ECF No. 51).

1 evidentiary hearing and the parties' closing briefs, Judge Ferenbach found that "it is clear to the
 2 [c]ourt that the basis for [d]efendant's stop was not to enforce statutes regarding pedestrians in
 3 the roadway—Officer Beckley's purpose was to stop and search [d]efendant based on his
 4 criminal history." (ECF No. 50 at 4). Moreover, due to the perceived inconsistencies in Officer
 5 Beckley's testimony and the lack of non-testimonial evidence that defendant had committed any
 6 offense prior to being stopped, Judge Ferenbach concluded that Officer Beckley lacked
 7 reasonable suspicion to stop defendant. (ECF No. 50 at 5). Accordingly, Judge Ferenbach found
 8 that the search incident to defendant's arrest violated the Fourth Amendment and recommends
 9 that the court suppress all evidence obtained as a result. *Id.* at 7.

10 **II. Legal Standard**

11 A party may file specific written objections to the findings and recommendations of a
 12 United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
 13 LR IB 3-2. Where a party timely objects to a magistrate judge's report and recommendation, the
 14 court is required to "make a *de novo* determination of those portions of the [report and
 15 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). The court "may accept,
 16 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."
 17 *Id.* However, "a district court may not reject the factual findings of a magistrate judge on a
 18 motion to suppress without conducting a *de novo* evidentiary hearing." *United States v.*
 19 *Ridgway*, 300 F.3d 1153, 1155 (citing *United States v. Berger*, 512 F.2d 391, 392–94 (9th Cir.
 20 1975)).

21 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of
 22 a magistrate judge within fourteen (14) days from the date of service of the findings and
 23 recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a
 24 motion within fourteen (14) days after service of the motion.

25 **III. Discussion**

26 The subjective intent of law enforcement officers is irrelevant where the circumstances
 27 surrounding the investigatory stop objectively satisfy either probable cause or reasonable
 28 suspicion. *United States v. Orozco*, 858 F.3d 1204, 1210 (9th Cir. 2017). However, in situations

1 where the officer's testimony is required to determine whether there was reasonable suspicion,
 2 that officer's credibility will necessarily be at issue. *See United States v. Evans*, 786 F.3d 779,
 3 789 (9th Cir. 2015) (holding that a finding of reasonable suspicion "depends in part on whether
 4 the district court finds the officers' testimony concerning the relevant facts credible, and in part
 5 on whether the information the officers had provided reasonable suspicion"). The Ninth Circuit
 6 has provided as follows:

7 In judging the credibility of a witness and determining the weight
 8 to be given to his testimony, the trier of the fact may consider the
 9 witness' demeanor and manner while on the stand, the character of
 10 his testimony as being probable or improbable, inconsistencies,
 11 patent omissions and discrepancies in his testimony, or between
 the testimony of different witnesses, contradictory testimony, his
 interest in the outcome of the case, his relationship to the litigants,
 and many other factors bearing upon the truthfulness or
 untruthfulness of the witness' testimony.

12 *Young Ah Chor v. Dulles*, 270 F.2d 338, 341 (9th Cir. 1959).

13 The Supreme Court has recognized that, as a practical matter, "the judge's assessment of
 14 the motives of the officers may occasionally influence his judgment regarding *the credibility of*
 15 *the officers' claims* with respect to what information was or was not available to them at the time
 16 of the incident in question." *Scott*, 436 U.S. at 139 n.13 (emphasis added). Accordingly,
 17 although Fourth Amendment inquiries are inoculated from an officer's subjective motive,
 18 determinations regarding that officer's credibility are not.

19 Judge Ferenbach concluded that Officer Beckley lacked credibility and, as a result, the
 20 government failed to meet its burden to show she had reasonable suspicion to stop defendant.
 21 (ECF No. 50 at 5). The government argues that Officer Beckley's credibility is not undermined
 22 by (1) her subjective intent and motivations in stopping defendant, (2) the "perceived testimonial
 23 inconsistencies" in her testimony, (3) her alternative references to jaywalking and pedestrian in
 24 the roadway, or (4) the omissions in her police report. (*See generally* ECF No. 51). The
 25 government further contends that the underlying motion to suppress should be denied because
 26 Officer Beckley "was justified in conducting a 'person stop'" or, in the alternative, had
 27 reasonable suspicion to initiate the stop. *Id.* at 8–9.

1 The court finds that the record supports Judge Ferenbach’s credibility determination, and
 2 the court comes to the same conclusion. Accordingly, no further evidentiary hearing is
 3 necessary.² Judge Ferenbach’s decision rested on the “inconsistencies during [Officer
 4 Beckley’s] testimony and in her written report regarding where and how the alleged offense took
 5 place and her admitted motivation ‘to try and make a stop on [defendant].’” (ECF No. 50 at 6
 6 (quoting ECF No. 43 at 69)).

7 When evaluating Officer Beckley’s credibility, the court considers the inconsistencies,
 8 omissions, and discrepancies in her report and testimony. *Young Ah Chor*, 270 F.2d at 341.
 9 Officer Beckley’s police report omitted information that she relied on to establish reasonable
 10 suspicion while testifying. *See, e.g., id.* at 37, 72, 81–83. The government argues that the
 11 omission of details in Officer Beckley’s report was de minimis. (ECF No. 51 at 7). The court
 12 disagrees.

13 Taken together, the omissions and inconsistencies in and between Officer Beckley’s
 14 report and testimony lead the court to conclude that “the basis for [d]efendant’s stop was not to
 15 enforce statutes regarding pedestrians in the roadway—Officer Beckley’s purpose was to stop
 16 and search [d]efendant based on his criminal history.” (ECF No. 50 at 4). Officer Beckley
 17 testified to her ability to recognize defendant by sight, but her police report states only that she
 18 “observed a black male adult wearing a black backpack walking southbound on Las Vegas
 19 Boulevard . . .” and that “[t]he male was identified as Tellis, Demetrick.” (*Compare* ECF No. 43
 20 at 70 *with* ECF No. 41 at 8, Defense Exhibit M). Similarly, Officer Beckley testified to another
 21 person walking with defendant, who must have also stepped off the sidewalk at some point, but
 22 never mentioned that person in her report. (*Compare* ECF No. 43 at 26, 37 *with* ECF No. 41 at
 23 8–9, Defense Exhibit M).

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 26 ² The court has enough information to come to this conclusion based on the evidentiary
 27 hearing transcript, the parties’ briefs, Judge Ferenbach’s R&R, the government’s objection, and
 28 defendant’s response. Because the court’s conclusion is consistent with the R&R’s
 determination of credibility, a de novo evidentiary hearing—as requested in the government’s
 proposed reply—is unnecessary. Thus, the government’s motion for leave to file a reply will be
 denied as moot.

1 More importantly, Officer Beckley did not definitively establish whether she suspected
 2 defendant of jaywalking or being a pedestrian in the roadway. (ECF No. 43 at 24–25, 52–53).
 3 Officer Beckley’s report did not include where she saw defendant step into the roadway. (ECF
 4 No. 43 at 37). Her testimony suggests that the first place she saw defendant step off the sidewalk
 5 was either into or next to an apartment complex’s driveway where there was no sidewalk. *Id.* at
 6 22–23, 45, 66. It is unclear—and Officer Beckley never definitively established, in either her
 7 testimony or her report—whether the defendant’s supposed jaywalking or entry into the roadway
 8 was the result of crossing the driveway. *Id.* at 24–25, 52–53. If defendant stepped off the
 9 sidewalk and into the driveway, his conduct would be legal, and Officer Beckley’s actions could
 10 not have been supported by reasonable suspicion.³

11 The court further considers Officer Beckley’s potential bias, motive, or interest in the
 12 outcome of the case. *Young Ah Chor*, 270 F.2d at 341. Officer Beckley herself admitted that she
 13 turned around on Las Vegas Boulevard with the express intent “to try and make a stop on
 14 [defendant].” (ECF No. 43 at 69). In fact, Officer Beckley admitted that Las Vegas
 15 Metropolitan police officers know the defendant because of his criminal history and, for that
 16 reason, she “would conduct surveillance on him” whenever she saw him because she thought
 17 “[t]hat he could possibly be armed or going to commit a crime.” *Id.* at 71–73. Thus, Officer
 18 Beckley resolved to follow and “make a stop” on defendant well before she witnessed anything
 19 that gave rise to reasonable suspicion.

20 In light of the foregoing discrepancies and Officer Beckley’s predetermined resolution to
 21 survey and stop defendant, the court finds that Officer Beckley’s testimony lacked credibility and
 22 could not be the basis for reasonable suspicion justifying the stop.

23 The government alternatively contends that Officer Beckley was justified in conducting a
 24 “person stop” or a simple “knock and talk.” (ECF No. 51 at 8–9). The government argues that
 25 Officer Beckley “could have approached [defendant] and asked to talk with him” and
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 28 ³ As Judge Ferenbach correctly indicated, NRS 484B.297(2) allows pedestrians to walk
 along the roadway where there is no sidewalk. (ECF No. 50 at 6).

1 “[defendant] would not have been obliged to answer, and likewise answers could not be
2 compelled, and refusal to answer would not be a basis for arrest.” *Id.*

3 However, Officer Beckley’s testimony on the stand is inconsistent with the government’s
4 characterization of a person stop. Contrary to the government’s argument, Officer Beckley
5 testified that a person stop is “[w]hen you activate your lights and sirens and call the individual
6 over to your vehicle *and do a—a cite or an arrest for the offense.*” (ECF No. 43 at 29 (emphasis
7 added)). Officer Beckley attempted to conduct a stop based on defendant’s alleged violation of
8 NRS § 484B.297. *Id.* at 27–28; (ECF No. 41 at 8, Defense Exhibit M (“I then conducted a
9 person stop on the male in front of the Sinclair Gas Station . . . *due to him violating NRS*
10 *484B.297.*” (emphasis added)). To that end, Officer Beckley “activated [her] vehicle’s lights and
11 sirens, and [she] got out of the vehicle and said, ‘Metro Police. Come over to my car.’” *Id.* at 27.

12 Thus, Officer Beckley’s alleged person stop was investigatory and nonconsensual, and,
13 therefore, must have been supported by reasonable suspicion. It was the government’s burden to
14 provide evidence demonstrating a reasonable suspicion that defendant had committed an offense
15 prior to being stopped. The government’s only evidence supporting reasonable suspicion was
16 Officer Beckley’s testimony. As discussed above, Officer Beckley’s testimony lacks credibility,
17 which precludes the court from finding that the government met its burden.

18 The court agrees with Judge Ferenbach: Officer Beckley lacked reasonable suspicion to
19 stop defendant and, by doing so anyway, violated his Fourth Amendment rights. Accordingly,
20 the motion to suppress shall be granted.

21 **IV. Conclusion**

22 Accordingly,

23 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judge Ferenbach’s R&R
24 (ECF No. 50) be, and the same hereby is, ADOPTED.

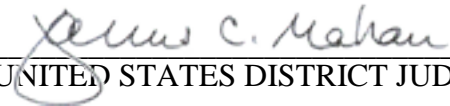
25 IT IS FURTHER ORDERED that defendant’s motion to suppress (ECF No. 26) be, and
26 the same hereby is, GRANTED.

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1 IT IS FURTHER ORDERED that the government's pending motion for leave to file a
2 reply (ECF No. 53) be, and the same hereby are, DENIED as moot.

3 DATED August 14, 2019.

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5 UNITED STATES DISTRICT JUDGE
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